

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

GERALD ELAM,

Petitioner,

v.

LARRY DENNEY,

Respondent.

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No. 4:09-CV-00308-DGK

ORDER PARTIALLY GRANTING CERTIFICATE OF APPEALABILITY

On September 3, 2010 the Court denied Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Now pending before the Court is Petitioner's Motion for Certificate of Appealability (doc. 30) and Motion to Perfect Appeal In Forma Pauperis (doc. 31).

To issue a certificate of appealability a district court must find that the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Tiedman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997). This requires the petitioner to "show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotation omitted).

After considering the five issues Petitioner claims are worthy of appellate review, the Court holds Petitioner has failed to make a substantial showing of the denial of a constitutional right on claims 2 (improper closing argument), 4 (ineffective assistance of counsel for failure to call Dr. Zimmerschied), and 5 (ineffective assistance of counsel for failure to submit a self-defense instruction). Reasonable jurists could debate, however, whether the issues presented in claims 1 and 3 (interrelated due process and ineffective assistance of counsel claims regarding Petitioner's competence to proceed) should be allowed to proceed further.

Consequently the request for a certificate of appealability is GRANTED IN PART. A certificate of appealability shall be issued with respect to claims 1 and 3.

Given that Petitioner has had over \$1,000 deposited in his inmate account between October 1, 2008 and April 28, 2009 and that he is represented by retained counsel, the Court cannot say that Petitioner is indigent and without funds to pay for the costs associated with this appeal. Accordingly the motion to proceed in forma pauperis is DENIED.

IT IS SO ORDERED.

Date: November 3, 2010

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT